

October 18, 2017

EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: October 18, 2017



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:) Case No. 13-31611 DM
)
KONSTANTIN KUPFER and MARGARITA) Chapter 11
KUPFER,)
)
)
)
Debtors.)

MEMORANDUM DECISION
REGARDING APPORTIONED ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

Before the court is the issue of apportioning compensable (uncapped) and non-compensable (capped) attorney's fees and costs stemming from a breach of contract dispute. For the following reasons, the court will fix the uncapped fees and costs in the amount of \$170,436.40, leaving capped, and therefore disallowed under section 502(b)(6)¹, fees and costs totaling \$23,747.78.

¹ Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 II. RELEVANT FACTS

2 The creditors KARIM SALMA and ROBERTA SALMA, as trustees
3 of the Salma Family Trust; LINDSEY S. BRUEL; RIYAD R. SALMA;
4 and LAITH K. SALMA (collectively, the "Salma Creditors") and
5 debtors KONSANTAIN KUPFER and MARGARITA KUPFER (collectively,
6 the "Debtors") were commercial landlord and tenants,
7 respectively.

8 In state court, Salma Creditors, represented by Phillip S.
9 Keith, Esq., argued Debtors breached two long-term commercial
10 leases and sued for damages. In response, Debtors filed
11 counterclaims and sought damages. The parties entered
12 arbitration in October 2012, and the arbitrators found in favor
13 of Salma Creditors, awarding them \$1,481,583.18 (hereafter, the
14 "Arbitration Award"). The Arbitration Award included damages
15 of \$1,287,399.00 (the "Damage Award") and an additional award
16 totaling \$194,184.18 (the "Expense Award"). The Expense Award
17 was comprised of attorney's fees of \$137,250 (the "Disputed
18 Fees") and costs of \$56,934.18 (the "Disputed Costs"). The
19 Disputed Costs consist entirely of fees for the arbitrators'
20 services.

21 Debtors filed for bankruptcy on July 16, 2013.
22 Thereafter, Salma Creditors filed a proof of claim for the
23 Arbitration Award. All amounts owed to Salma Creditors other
24 than the remaining Disputed Fees and Disputed Costs have been
25 paid. Pursuant to an *Order Granting Debtor's Motion For A Stay*
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1 *Pending Appeal Or, In The Alternative, Approval Of A*
2 *Supersedeas Bond* entered on January 29, 2014, the Debtors set
3 aside funds sufficient to cover the Expense Award. Doc. 155.
4 The security, \$235,000, is in a blocked bank account.

5 III. PROCEDURAL HISTORY

6 The issue now before the court is limited to which of the
7 Disputed Fees and Disputed Costs are capped by section
8 502(b)(6) and which are uncapped. When originally presented
9 this issue, the court found that section 502(b)(6) did not cap
10 any amounts and awarded Salma Creditors the entire Expense
11 Award.

12 Debtors appealed, and the district court affirmed.
13 Debtors appealed again and the Ninth Circuit reversed both
14 courts and remanded the case to the district court, which then
15 remanded to this court.

16 Upon remand, the parties were afforded a final opportunity
17 to submit arguments.² The matter was then taken under
18 submission.

19 IV. NINTH CIRCUIT MANDATE

20 The Ninth Circuit found that under section 502(b)(6), an
21 all-or-nothing approach was not appropriate in determining the
22 allowed amount of Disputed Fees and Disputed Costs. The court
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24 ² The court denies Salma Creditor's Motion to Strike the
25 Surreply. The matter was resolved by a Docket Order entered on
26 September 22, 2017, which gave Salma Creditors the opportunity to
27 reply to Debtors' Surreply.

1 reasoned that factual findings were required to determine which
2 of the amounts requested are capped and which are uncapped:

3
4 "Fees attributable to litigating Creditors' claims for
5 future rent are capped, because such claims would not
6 arise were the leases not terminated. But the arbitration
7 award also included damages for *past* rent, which
8 Creditors could claim independent of termination; the
9 fees attributable to that portion of the litigation are
not capped. The parties also litigated Debtors' numerous
counterclaims. To the extent that the counterclaims
concerned ordinary alleged breaches, independent of a
lease termination, the associated fees and costs are not
capped, either.

10 On remand, the . . . court first must categorize
11 all claims as either directly resulting from termination
12 of the leases, or not. The former are capped; the latter
13 are not. The court then must apportion the associated
fees and costs accordingly."

14 *Kupfer v. Salma (In re Kupfer)*, 852 F.3d 853, 859 (9th
15 Cir. 2016)(emphasis in original).

16 V. DISCUSSION³

17 The direction from the Ninth Circuit is easy to carry out,
18 if applied literally. First, the court has been told to
19 "categorize all claims as either directly resulting from
20 termination of the leases, or not." The Final Arbitration
21 Award discloses how the arbitrators calculated the Damage
22 Award. For Suite 106, they awarded unpaid rent, additional
23 rent, late charges and interest in the amounts of \$241,893.00
24 and \$140,768.65, for a total of \$382,661.65. Then they added

25 ³ The following discussion constitutes the court's findings of
26 facts and conclusions of law. Fed. R. Bankr. P. 7052 (a).

1 discounted future rent in the amount of \$495,805.00. See Final
2 Arbitration Award at 6:21-7:1.

3 For Suite 205, they awarded rent and interest in the
4 amount of \$112,483.00. Then they awarded discounted future
5 rent in the amount of \$296,450.00, for a total of \$408,933.00.
6 See Final Arbitration Award, 8:1-7.

7 From the foregoing the total for unpaid rent and related
8 liability for Suites 106 and 205 is \$495,144.00. The total for
9 lost future rent is \$792,255.00.

10 The Ninth Circuit said that, after determining how to
11 categorize the damages, the court must "apportion the
12 associated fees and costs accordingly." Returning to the lease
13 damages, the lost future rent portion represents 61.539 percent
14 of the Damage Award (\$792,255.00 divided by \$1,287,399.00).
15 Applying that same percentage (61.539%) to the Disputed Fees
16 and the Disputed Costs would result in apportioned totals of
17 \$84,462.28 in attorney's fees and \$35,036.72 in costs and the
18 balance of \$52,787.72 in uncapped attorney's fees and
19 \$21,897.46 in uncapped costs, as applicable to the back rent
20 and related liabilities.

21 What appears to be a simple, literal, and mathematical
22 calculation, which the Ninth circuit could have done itself
23 since the arbitrators' reasoning is clear, would have disposed
24 of the matter. However, that is too facile a disposition and
25 does not comport with the reality of the legal work performed
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1 by Mr. Keith for Salma Creditors. Both sides instead argue
2 that, as to the Disputed Fees, there must be an analysis of the
3 actual work performed to see if it relates to the future rent
4 or the past rent and to other issues that were tried. As to
5 the Disputed Costs, the Debtors' use the arbitrators' move out
6 dates as a demarcation to allocate uncapped and capped costs;
7 Salma Creditors argue that none of those costs should be
8 capped.

9 A. Disputed Fees

10 Salma Creditors concede a capped amount of \$9,945.00 of
11 the Disputed Fees. The remaining \$127,305 must be apportioned
12 as uncapped or capped.

13 1. Burden of Proof

14 The parties agree the claimant has the burden of proving
15 what portions of its claims are capped and uncapped ("The Salma
16 Creditors have the burden of proof. In fact, they've embraced
17 that, they've agreed they have the burden of proof and they
18 offered to go forward and . . . make the motion."). Hearing
19 Audio, Doc. No. 293, at 5:21. However, once the claimant has
20 met the burden of proof, the court must be persuaded to find
21 otherwise. The burden of persuasion shifts and the objecting
22 party therefore must show that the proof of claim is subject to
23 being capped. *In re Intern. BioChemical Indus., Inc.*, 521 B.R.
24 395, 399 n.2 (Bankr. N.D. Ga. 2014).

1 Salma Creditors have made a prima facie showing by
2 proffering declarations and exhibits to demonstrate a majority
3 of the fees dealt with past rent matters. To upset this
4 showing, Debtors must persuade the court that all Disputed Fees
5 were related to termination issues. Absent a showing that the
6 Disputed Fees are capped, the court has no alternative but to
7 uphold the prima facie showing that they are uncapped.

8 2. Inadmissibility of Records

9 Apart from the evidentiary issues discussed below, the
10 Ninth Circuit left the court with a difficult task and, to
11 state it bluntly and simply, the court needs all the help
12 available to carry out that task.

13 In their *Motion to Strike Supplemental Declaration of*
14 *Philip S. Keith*, Doc. 290, Debtors object on grounds of
15 relevance, Federal Rule of Evidence 403, hearsay, and Federal
16 Rules of Bankruptcy Procedure 9006(d). They contend Mr.
17 Keith's "shifting recollection" makes him an unreliable and
18 non-credible witness. Doc. 290, p. 1:26-29, 2:1, 4: 1-16.

19 First, Debtors argue that Mr. Keith's Second Supplemental
20 Declaration and attached exhibits "G" and "H" are irrelevant
21 because Salma Creditors introduced them to show the time
22 records were entered by 2015. Instead Salma Creditors needed
23 to show the records were kept contemporaneously. Doc. 290, p.
24 2: 5-14. Second, the inability to show the records were kept
25 contemporaneously ultimately lends to Salma Creditors'

1 inability to establish hearsay exceptions. Doc 290, p. 2:21-
2 28. Third, they argue under Federal Rule of Bankruptcy
3 Procedure 9006(d) that an affidavit in support of a motion must
4 be filed with the motion. The introduction of the exhibits is
5 unfairly prejudicial because Salma Creditors attempt to bolster
6 the record with additional evidence that could have been, but
7 was not, offered. Doc. 290, p. 3:18-24.

8 Salma Creditors contend that the *Motion to Strike* is
9 meritless. They argue that the exhibits are relevant because
10 they show the time records were in existence no later than May
11 1, 2013. Doc. 291-2, p. 9:25-28, 10:1-6. Consequently, the
12 time records are inherently contemporaneous; otherwise Salma
13 Creditors would not have been able to request an award of
14 attorney's fees from the arbitrators. Debtors never challenged
15 the motion during arbitration and ultimately Salma Creditors
16 were awarded the Disputed Fees based upon 305 hours of Mr.
17 Keith's recorded time by the arbitrators. Additionally, they
18 argue the Debtors have failed to demonstrate the court will be
19 confused on the issue. The court is not confused and, as
20 explained below, all of the Debtors' objections to Mr. Keith's
21 time records are overruled.

22 a. Relevance

23 Evidence is relevant if it has any tendency to make a fact
24 more or less probable than it would be without the evidence and
25 the fact is of consequence in determining the action. Fed. R.
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1 Evid. 401. Mr. Keith's time records assist the court in its
2 determination of capped or uncapped fees. Therefore, they are
3 relevant.

4 b. Hearsay

5 Hearsay is defined as an out-of-court statement offered
6 for the truth of the matter. Fed. R. Evid. 801(c). The policy
7 reasons for the exclusion of hearsay are to ensure indicia of
8 reliability. The matters asserted here are the amount of hours
9 Mr. Keith spent on past rent or termination issues.

10 First, Debtors' contention that the time records are not
11 sworn testimony are summarily dismissed. Doc. 286, p. 7:6-7.
12 Both iterations of Salma Creditors' exhibits regarding time
13 records were accompanied by Mr. Keith's sworn declarations.
14 Further, there is no evidence to suggest, and it has not been
15 argued, that Mr. Keith's work was manufactured or not
16 performed. Moreover, neither the Debtors nor the arbitrators
17 took issue with the amount of work done by Mr. Keith before
18 this case was commenced. Therefore, the truth of the matter is
19 not in question. On these bases alone, the evidence is
20 admissible.

21 Second, Debtors take issue with the contemporaneous nature
22 of the exhibit.

23 i. Business Records Exception

24 The party seeking to admit a business record under the
25 exception bears the burden of proof. To satisfy the business
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1 records exception the document must be: (1) created at or near
2 the time of the event, not in preparation for litigation, by
3 someone with personal knowledge; (2) a regular practice to
4 create and keep such a document; (3) done by a custodian; and
5 (4) defensible against lack of trustworthiness. Fed. R. Evid.
6 803(6). The record does not indicate any of these requirements
7 are missing.

8 When a party relies on a record contemporaneously prepared
9 while acting under a business duty of care and accuracy, there
10 are circumstantial guarantees of trustworthiness in the record.
11 *United States v. Licavoli*, 604 F.2d 613, 622 (9th Cir. 1979).
12 However, "the regular course of business must have been to make
13 such records contemporaneously or within a reasonable time
14 thereafter." *United States v. Anderson*, 447 F.2d 833, 838 (8th
15 Cir. 1971). "It is the circumstances under which the records
16 are recorded, kept, maintained, and used that give the
17 reliability essential to the law's conclusion." *State v.*
18 *Robinson*, 272 Neb. 582, 587, 724 N.W.2d 35, 48 (2006).

19 Mr. Keith used Timeslips software to keep records for his
20 business. There is no question that he understands the methods
21 of the software because he used the software for the duration
22 of his work on the matter. With that, Mr. Keith can be
23 considered a custodian. Additionally, it is his regular
24 practice to keep records of his time spent on clients' matters.
25 Doc. 289, p. 2:22-24. There is nothing in the record to
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1 suggest the records were not made within a reasonable time
2 because they were submitted no later than Salma Creditors'
3 submission of attorney's fees to the arbitrators. Mr. Keith's
4 fees are allowable only if he can provide a "receipt" of the
5 work he has done and the time apportioned to each task.
6 Accordingly, he is only able to run his business if he keeps
7 accurate records. These factors lead to circumstantial indicia
8 of reliability.

9 After scrutinizing the record, the court is satisfied that
10 the entries provided by Mr. Keith satisfied the business
11 records exception.

12 ii. Past Recollection Recorded

13 A document is admissible as past recorded recollection if
14 (1) the witness once had knowledge about the matters in the
15 document, (2) but now has insufficient recollection to testify
16 fully and accurately, and (3) the record was made at a time
17 when the matter was fresh in the witness' memory and reflected
18 the witness' knowledge correctly. *United States v. Patterson*,
19 678 F.2d 774, 778 (9th Cir. 1982). The past recollection
20 recorded exception allows for the document to assist the
21 declarant and can be used for the truth of the matter, but is
22 not admitted in to evidence. Fed. R. Evid. 803(5).

23 Mr. Keith has knowledge about the proceeding since he
24 represented Salma Creditors. Understandably, he was unable to
25 recall minute detail from his work four to six years prior.
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1 However, he did recall the general nature of proceedings
2 because he was able to refer to his Timeslips records: "It's
3 not a guess. It's my recollection that I did not spend a
4 significant amount of time on future rent issues." Keith
5 Depo., 84:20.

6 The exception allows Mr. Keith to review his records and
7 testify to the nature of his work.

8 c. Fed. R. Evid. 403

9 Although relevant, evidence may be excluded if its
10 probative value is substantially outweighed by the danger of
11 unfair prejudice, confusion of the issues, or misleading the
12 jury, or by considerations of undue delay, waste of time, or
13 needless presentation of cumulative evidence. Fed. R. Evid.
14 403. "The rule articulates the judicial power to exclude
15 relevant evidence because of prejudicial dangers or
16 considerations." *United States v. Hankey*, 203 F.3d 1160, 1164
17 (9th Cir. 2000). Its principal design is to promote the "twin
18 policies of assuring 'correct' factual determinations in
19 individual cases and actual and perceived fairness in the
20 judicial process as a whole." *United States v. Robinson*, 544
21 F.2d 611, 616 (2d Cir. 1976), on reh'g, 560 F.2d 507 (2d Cir.
22 1977), *citing* Dolan, *Rule 403: The Prejudice Rule in Evidence*,
23 49 So.Cal.L.Rev. 220, 226-30 (1976).

24 The probative value of the records is high because it
25 provides for dates, descriptions, and time allotted to each
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1 task. Any perceived danger from this record is low because the
2 Debtors were afforded an opportunity during the arbitration to
3 contest any of the information within the document. They did
4 not and still do not contest the amount of work, or the work
5 itself, performed by Mr. Keith. The probative value
6 substantially outweighs any danger.

7 d. Fed. R. Bankr. P. 9006(d)

8 Federal Rule of Bankruptcy Procedure 9006(d) provides that
9 if a motion is supported by affidavit, the affidavit shall be
10 served with the motion. The exhibits in question were
11 submitted after the originally filed motion. The court
12 concludes that Debtors' were not denied a fair opportunity to
13 reply. Any harm that Debtors' claim to encounter is harmless.

14 3. Apportionment of Disputed Fees

15 Salma Creditors made a case for uncapped Disputed Fees
16 less the amount they concede as capped (\$9,945.00). Debtors
17 argue the entirety of the Disputed Fees should be capped
18 because this is a termination action and that all counterclaims
19 were not independent of termination. Doc. 296.

20 Salma Creditors rely on *In re El Toro Materials Co.*, which
21 used a simple test to determine whether damages result from the
22 termination of a lease: "Assuming all other conditions remain
23 constant, would the landlord have the same claim against the
24 tenant if the tenant were to assume the lease rather than
25 rejecting it?" *Saddleback Valley Cmty. Church v. El Toro*

1 *Materials Co. (In re El Toro Materials Co.)*, 504 F.3d 978,
2 981(9th Cir. 2007). They argue none of the counterclaims
3 sought termination of the leases and were only an attempt to
4 collect money from Salma Creditors. Doc. 301.

5 In accordance with the Ninth Circuit's mandate to
6 apportion Disputed Fees, the court scrutinized Mr. Keith's time
7 records and apportioned the Disputed Fees as best as it could.
8 In doing so, the court created an attachment that lists each
9 slip listing indicated by: identification number, date, time
10 allotted to and description of the task.

11 The attached sheet shows a total of 324.95 hours spent by
12 Mr. Keith on the matter. The court began by first attempting
13 to resolve the discrepancies in hours and removed any non-legal
14 work. This accounted for 13.5 hours and is indicated by bold
15 font and darkened boxes, leaving 311.45 hours. Unable to
16 account for the additional hours, the court then limited the
17 maximum number of hours to 305, the total allowed by the
18 arbitrators. Next, the court went through each description,
19 and using its experience and judgment, resolved the factual
20 issues to indicate what amount of time would be attributed to
21 "termination of the leases, or not" to calculate the capped and
22 uncapped fees. *In re Kupfer*, 852 F.3d at 859. The attached
23 sheet is six columns that follow the format of exhibits
24 presented to the court. They include columns for the date,
25 respective slip listing identification number, uncapped hours,
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1 capped hours, and descriptions. An additional column was added
2 to notify the parties when the court accepted Mr. Keith's
3 capped portion or when the court, after reading the description
4 of work provided, saw fit to cap portions of that time entry.
5 Those are denoted by either "K" or "*", respectively.

6 The court then took the total hours attributable to work
7 involving capped fees (including the 22.1 hours Mr. Keith
8 identified) and subtracted them from 305 to calculate the hours
9 spent on uncapped matters. Finally, using the allowed hourly
10 rate of \$450, it multiplied the hours for the respective
11 entries to arrive at the capped and uncapped fees, namely,
12 capped fees of \$16,785 and uncapped fees of \$120,465.^{4/}

13 B. Disputed Costs

14 As mentioned above, the entirety of the Disputed Costs
15 consists of fees for the arbitrators' services.

16 Salma Creditors advocate for the arbitrators to receive
17 their entire fee for work throughout the arbitration. Salma
18 Creditors proffer that a majority of the calculations for
19 future damages were performed by their broker, John Bruel.
20 Additionally, they argue that, if any future rent calculation
21 was determined by the arbitrators, it was statutorily driven by
22 a perfunctory implementation of California Civil Code § 1951.2.

25 ^{4/} Note that the uncapped fees are 87.877 percent of the Disputed
26 Fees (\$120,465 divided by \$137,250).

1 Debtors argue that using the move out dates would
2 designate 25% of Disputed Costs to past rent issues and the
3 remaining 75% to future rent issues. Applying the percentages
4 Debtors suggest to the Disputed Costs amounts to \$14,233.545
5 for past rent issues and \$42,700.635 for future rent issues.
6 Debtors reason that, once the lease was terminated, only future
7 rent issues remained and effectively all damages from past rent
8 were resolved.

9 Contrary to Debtors' argument, the parties stipulated to a
10 set-off amount of \$5.25 per square foot for Suite 106. Doc.
11 276, p. 6:7-10. The purpose of this set-off amount allowed for
12 the parties to agree on a value for future rent damages Salma
13 Creditors suffered. Suite 205 was released and therefore a
14 set-off amount was not disputed. Doc. 276, p. 6:9-10. Neither
15 party contends future rent issues were not summarily dealt with
16 according to the terms of the leases. It follows that 75% of
17 the time could not have been afforded to future rent or
18 termination issues and a majority of the time by the
19 arbitrators was spent on past rent issues and affirmative
20 damages sought by Debtors.

21 The Debtors' arguments concerning the Disputed Costs are
22 not persuasive. That said, there had to be some time devoted
23 by the arbitrators to hearing testimony or argument about
24 future rent issues, and then deciding as they did. But there
25 can be little doubt that the vast majority of the arbitrators'

1 time and efforts were attributable to the past rent claims and
2 the disposition of the counterclaims. Under these
3 circumstances and given the instructions from the Ninth
4 Circuit, the fairest way to allocate the Disputed Costs is to
5 do so based on the allocation of the Disputed Fees, namely,
6 87.77% (\$49,971.40) as uncapped and the balance (\$6,962.78) as
7 capped.

8 VI. CONCLUSION

9 Following the mandate of the Ninth Circuit, this court
10 finds in favor of Salma Creditors in uncapped Disputed Fees and
11 uncapped Disputed Costs totaling \$170,436.40, leaving Debtors
12 with capped Disputed Fees and capped Disputed Costs totaling
13 \$23,747.78. The court is concurrently issuing an order
14 consistent with the foregoing.

15 ****END OF MEMORANDUM DECISION****
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Court Service List

[None]